2004

State of Utah v. Edwin Birdhand Lehi : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20040260-CA
EDWIN BIRDHAND LEHI, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A FELONY CONVICTION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL AND MISDEMEANOR CONVICTIONS OF DRIVING ON A SUSPENDED OR REVOKED LICENSE AND DRIVING WITHOUT REGISTRATION IN THE SEVENTH JUDICIAL DISTRICT, GRAND COUNTY, THE HONORABLE LYLE R. ANDERSON PRESIDING

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ORAL ARGUMENT NOT REQUESTED

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of driving under the influence of alcohol, a third degree felony, in violation of Utah Code Ann. § 41-6-44 (West 2004), driving on a suspended or revoked license, a class B misdemeanor, in violation of Utah Code Ann. § 53-3-227(3)(a) (West 2004), and driving without registration, a class C misdemeanor, in violation of Utah Code Ann. § 41-1a-1303(1) (West 2004), in the Seventh Judicial District, Grand County, the Honorable Lyle R. Anderson presiding.[1] This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

[1] The Utah Legislature has amended all of these statutes since 2000. The changes are not relevant to the issues on appeal and do not affect their analysis. Therefore, for convenience the State cites to the West 2004 version of the statutes.

ISSUE ON APPEAL AND STANDARD OF REVIEW

Did the jury instructions adequately convey the concept of "reasonable doubt"?

Standard of review. "Whether [a jury] instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's ruling." *State v. Reyes*, 2004 UT App 8, 84 P.3d 841, *rev'd on other grounds*, 2005 UT 33, 116 P.3d 305 (quotation marks and citation omitted) (alteration in original).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provisions, statutes, or rules are directly relevant to the issue on appeal.

STATEMENT OF THE CASE

Defendant was charged by information with three counts stemming from an August 25, 2000 incident: driving under the influence of alcohol, a third degree felony, in violation of Utah Code Ann. § 41-6-44; driving on a suspended or revoked license, a class B misdemeanor, in violation of Utah Code Ann. § 53-3-227(3)(a); and driving without registration, a class C misdemeanor, in violation of Utah Code Ann. § 41-1a-1303(1). R1-2. Defendant pled guilty to the felony offense, and the trial court imposed judgment. R33-42.

Defendant later moved to withdraw his guilty plea. R44. The trial court denied defendant's motion, and defendant appealed. R98-103. This Court reversed, holding that the trial court failed to comply strictly with rule 11(e), Utah Rules of Criminal Procedure, when it took defendant's plea. *See State v. Lehi*, 2003 UT App 212, ¶ 17, 73 P.3d 985.

Following remand, defendant's case was tried to a jury. The jury returned guilty verdicts on all three counts. R150. The trial court imposed a prison term not to exceed five years on the DUI conviction. R168-169. The court also imposed six-month and 90-day terms on the misdemeanor counts, to be served concurrently with the prison term on the DUI conviction. *Id.* Defendant timely appealed. R171.

After defendant filed his brief of appellant, the State moved this Court to stay proceedings pending the Utah Supreme Court's disposition of three cases likely to set forth controlling law—*State v. Reyes*, 20040078-SC; *State v. Weaver*, 200200735-SC; and *State v. Cruz*, 200300199-SC. The Supreme Court subsequently entered decisions in those cases, and this Court reestablished the briefing schedule. *See* Order dated August 9, 2005.

STATEMENT OF THE FACTS

At about 8:20 a.m. on August 25, 2000, defendant and Dustin Yellow drove into the Shirt Tail convenience store in Blanding, Utah. R175:60, 90. They picked up a twelve-pack of beer and left. R175:60-61. About an hour and a half later, they returned. R175:61. Yellow came in to pay for gas. R175:66. Defendant attempted to pull his pickup alongside the pumps. R175:62.

Jeff Rogers, the store manager, observed that defendant was having difficulty lining his vehicle up with the pumps. *Id.* He saw the vehicle lurching and heard tires screeching. *Id.* Defendant was "poppin' the clutch and jerkin' it" and "[s]tompin' on the brake." *Id.* Rogers stated, "[T]he whole affair looked a whole lot like tryin' to teach

your kids how to drive a stick shift. He was havin' a hard time with it. And he finally got up to the dispenser." *Id.*

After defendant stepped out of the pickup, Rogers observed that defendant "was standin' there and he could not quite hold himself." R175:63. After watching defendant's behavior, Rogers called the Sheriff's Office. *Id.*; *see also* R175:66. He reported that he had a drunk driver at the store and asked the Sheriff's Office to get "somebody down there and fast, cause [Rogers] didn't want him leavin' before they got there." R175:66.

Defendant and Yellow got into an argument beside the pumps. R175:67. Both of them entered the store, still arguing. *Id.* Rogers observed that defendant's eyes were glazed, that his face had started to sag, and that he was weaving. R175:68. When Rogers heard defendant threatening Yellow, he again called the Sheriff's Office. *Id.*

San Juan County Sheriff Mike Lacy and Blanding police officer Mike Bradford responded to Rogers' call. R175:76, 86. Sheriff Lacy took defendant into custody. R175:76. Sheriff Lacy could smell the strong odor of alcohol on defendant. R175:77. He asked defendant to submit to field sobriety tests. *Id.* Defendant refused. *Id.*

Defendant told Sheriff Lacy that he had drunk a twelve-pack of beer that morning. R175:78. Sheriff Lacy noted that defendant was "[v]ery agitated . . . at [Yellow]." *Id.* He also observed that defendant had slurred speech, spoke with a "thick tongue," and had a difficult time maintaining his balance. R175:78-79.

Sheriff Lacy transported defendant to the jail. R175:79. When the Sheriff took defendant out of the patrol car, he had to hold defendant by the elbow to "[m]ake sure

that he didn't fall to the ground." *Id.* Even after his handcuffs were removed, defendant moved from side to side as he was walking into the jail. R175:80. At the jail, defendant was asked to take a breathalyzer test. R175:79. Defendant refused. *Id.*

Based on his training and experience, Sheriff Lacy opined that defendant could not safely operate the vehicle. R175:80-81.

Defendant stipulated that "you may take it as proven that he was driving a motor vehicle on a highway of this state on or about August 25, 2000, while his license to do so was denied, disqualified, suspended or revoked, and that the vehicle was not registered as required by law." R139 (Jury Instruction 4).

SUMMARY OF ARGUMENT

Recent case law defeats defendant's claim that the trial court erred in giving the reasonable doubt instruction. Utah courts have now expressly abandoned any requirement that the jury be instructed that the prosecution must "obviate" all reasonable doubt. Rather, the jury instructions as a whole must correctly communicate the concept of reasonable doubt.

In this case, the instructions as a whole correctly communicated the concept of reasonable doubt. They informed the jury that the State was required to prove guilt beyond a reasonable doubt. They instructed that the jury should acquit if the State failed to prove any element beyond a reasonable doubt. The instructions further defined and explained the concept of reasonable doubt.

ARGUMENT

THE JURY INSTRUCTIONS ACCURATELY CONVEYED THE CONCEPT OF REASONABLE DOUBT

Defendant claims that the trial court's reasonable doubt instruction was erroneous because it informed the jury that "the [S]tate must prove guilt beyond a reasonable doubt," rather than that "the State's proof must obviate all reasonable doubt." Br. Appellant at 11. Defendant argues that the instruction did not "comport with the three part test set forth in *State v. Robertson*, 932 P.2d 1219 (Utah 1997)." *Id.* at 10.

District court proceedings. Defendant requested that the district court give a reasonable doubt instruction telling the jury that the State must "obviate all reasonable doubt." R156. After discussing the instruction with counsel and after ascertaining that most of the jurors did not know the meaning of "obviate," the court declined to give the instruction. R175:115120, 133-134, 153-154.

Instead, the court instructed the jurors that "[t]he [S]tate must prove guilt beyond a reasonable doubt." R140. The instruction stated:

> A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.
>
> The [S]tate must prove guilt beyond a reasonable doubt. Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable

> doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.

Id.

Analysis. The *Robertson* standard, urged by defendant, is no longer good law. Under current law, the instructions, taken as a whole, must simply communicate that a defendant cannot be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime.

In *State v. Reyes*, 2004 UT App 8, 84 P.3d 841, this Court, relying on *Robertson*, held that a jury instruction was improper because it stated that "[t]he burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt," rather than stating that the burden was on the prosecution to "obviate all reasonable doubt." *Id.* at ¶¶ 11, 19, 22. In so doing, this Court observed that the *Robertson* decision could not be reconciled with United States Supreme Court's decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), but held that it did "not have the authority to overrule *Robertson*." *Id.* at ¶ 21. On certiorari review, following this Court's lead, the Utah Supreme Court "expressly abandon[ed]" its own precedent, as established in *Robertson*, and reversed this Court's decision. *State v. Reyes*, 2005 UT 33, ¶¶ 30, 34, 116 P.3d 305.

In two more recent decisions, the Supreme Court reaffirmed its decision in *Reyes*. In *State v. Cruz*, 2005 UT 45, 530 Utah Adv. Rep. 30, the Court stated, "[P]ursuant to our opinion in *Reyes*, the *Robertson* test is no longer in force. We now adhere instead to the *Victor* test for assessing the validity of reasonable doubt instructions." *Id.* at ¶ 21 (citations omitted). The Court continued, "Simply put, we need only ask whether the

instructions taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

In *State v. Weaver*, 2005 UT 49, 530 Utah Adv. Rep. 15, the Supreme Court again rejected a defendant's claim that a jury instruction was erroneous because it "omitted the term 'obviate.'" *Id.* at ¶¶ 2, 8. The Court observed that the jury instructions, "viewed as a whole, adequately communicated to the jury the concept of reasonable doubt." *Id.* at ¶ 8. One instruction "informed the jury that the State had the burden of proof and that 'a defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt." *Id.* Other instructions further explained the concept of reasonable doubt. *Id.*

In the instant case, the instructions were adequate. Jury instruction 5 informed the jury that "[t]he [S]tate must prove guilt beyond a reasonable doubt." R140. That instruction mirrors the instruction in *Reyes*, which informed the jury that "[t]he burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt." 2005 UT 33, ¶ 2. The instruction further stated, "A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial." R140. It also defined "reasonable doubt": "Reasonable doubt is doubt based on reason, which is reasonable in view of all the evidence. . . . A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case." *Id.* It further explained the concept of reasonable doubt: "Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a

reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt." *Id.*

In addition, jury instruction 3, the elements instruction, directed, "If you believe that the [S]tate has proved each of these elements beyond a reasonable doubt, you should find defendant guilty. If the [S]tate has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty." R138.

The instructions in this case are not erroneous simply because they do not incorporate the "obviate all reasonable doubt" language. The instructions are adequate because "taken as a whole," they "correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Cruz*, 2005 UT 45, ¶ 21 (citing *In re Winship*, 397 U.S. at 364).

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted this 1st day of November, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2005, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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